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FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

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CLERK

Attorneys for Complainant-Appellant
STATE OF HAWAII ORGANIZATION
OF POLICE OFFICERS

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

19-1-0270-02

JHA

In the Matter of

STATE OF HAWAII ORGANIZATION
OF POLICE OFFICERS (SHOPO),

Complainant-Appellant,

vs.

HAWAII LABOR RELATIONS BOARD;
MARCUS R. OSHIRO, SESNITA A.D.
MOEPONO, and J N. MUSTO,

Agency-Appellees,

and

SUSAN BALLARD, CHIEF OF POLICE OF
THE HONOLULU POLICE DEPARTMENT,
CITY AND COUNTY OF HONOLULU,

Respondents-Appellees.

Civil No. _____
(Agency Appeal)

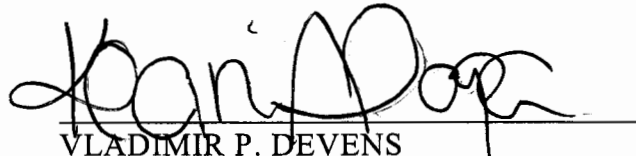
NOTICE OF APPEAL TO THE
CIRCUIT COURT; STATEMENT OF
THE CASE; EXHIBIT "A";
DESIGNATION OF RECORD ON
APPEAL; ORDER FOR
CERTIFICATION AND
TRANSMISSION OF RECORD;
REQUEST FOR WRITTEN BRIEFS
AND ORAL ARGUMENT;
CERTIFICATE OF SERVICE

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NOTICE OF APPEAL TO THE CIRCUIT COURT

COMES NOW, STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS ("SHOPO" or "Union"), Complainant-Appellant above-named, by and through its above-named attorneys, pursuant to Hawai'i Revised Statutes ("HRS") §§ 91-14, and 377-9 (f) and (i), and Rule 72 of the Hawai'i Rules of Civil Procedure and hereby gives notice of an appeal to the Circuit Court of the First Circuit from Order No. 3442, dated January 17, 2019, entitled "ORDER GRANTING RESPONDENTS' MOTION FOR JUDGMENT ON PARTIAL FINDINGS AGAINST COMPLAINANT" rendered in Case No. 18-CE-12-910 by the Hawai'i Labor Relations Board ("HLRB" or "Board"). A copy of Order No. 3442 is attached as Exhibit A.

DATED: Honolulu, Hawaii, February 15, 2019.


VLADIMIR P. DEVENS
KEANI ALAPA

Attorneys for Complainant-Appellant
SHOPO

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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STATEMENT OF THE CASE

STATEMENT OF THE CASE

COMES NOW, STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (“SHOPO” or “Union”), for its statement of the case, pursuant to Rule 72(e) of the Hawaii Rules of Civil Procedure in its appeal from Order No. 3442, dated January 17, 2019, rendered in Case No. 18-CE-12-910 by the Hawai'i Labor Relations Board and alleges and avers as follows:

THE PARTIES TO THE APPEAL

1. Complainant-Appellant SHOPO was and is the certified exclusive representative and collective bargaining agent for all police officers up to the rank of Lieutenant within the

State of Hawaii under bargaining unit 12 (“BU-12”), as that bargaining unit is defined under HRS §§89-2 and 89-6(a)(12), and has been so recognized and certified by the Hawaii Labor Relations Board (“HLRB” or “Board”), and its predecessor the Hawaii Public Employment Relations Board.

2. Respondent-Appellee Susan Ballard (“Respondent Ballard” or “Chief Ballard”) was and is the duly appointed Chief of Police for the Honolulu Police Department (“HPD”), City and County of Honolulu, State of Hawaii, and an employer or public employer as defined under HRS §89-2 and under the applicable collective bargaining agreement (“CBA”).

3. Respondent-Appellee City and County of Honolulu (“Employer”) is a political subdivision of the State of Hawaii, and a public employer as defined under HRS §89-2, and under the applicable CBA covering the relevant periods.

4. The HRLB is an administrative agency within the meaning of HRS § 91-1 and HRS § 3 77-1, and its members consist of Marcus R. Oshiro (Chairperson), Sesnita A.D. Moepono, and J N. Musto.

THE COURT’S JURISDICTION AND VENUE

5. The Court has jurisdiction to review decisions and orders of the HLRB under HRS §§ 89-14, 91-14, 377-9 (f) and HRCP Rule 72.

6. The Circuit Court of the First Circuit is the proper venue for this appeal under HRS § 377-9 (f) because “[a]ny person aggrieved by the decision or order of the board may obtain a review thereof as provided in chapter 91 by instituting proceedings in the circuit court of the judicial circuit in which the person or any party resides or transacts business, subject, however, to the general provisions of law for a change of the place of trial or the calling in of another judge.” Furthermore, since SHOPO is the “person

aggrieved” by the Board’s Order No. 3442, dated January 17, 2019, and SHOPO’s main office and the HLRB are both located on the island of Oahu, it is manifest that the Circuit Court of the First Circuit is the proper venue for this appeal.

HRS CHAPTER 89

7. The Hawaii Legislature has declared under HRS §89-1(a) “that joint decision-making is the modern way of administering government. Where public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work; to provide a rational method for dealing with disputes and work stoppages; and to maintain a favorable political and social environment.” The Legislature further declared under HRS §89-1(b) “that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government.”

8. Pursuant to HRS §89-3, “Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion.”

9. Under HRS §89-13(a), it is a prohibited practice for a public employer to

willfully:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
- (2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;
- (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;
- (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;
- (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

...

- (7) Refuse or fail to comply with any provision of this chapter;
- (8) Violate the terms of a collective bargaining agreement;

Haw. Rev. Stat. § 89-13.

COLLECTIVE BARGAINING AGREEMENT

10. At all times relevant herein, SHOPO and the Employer are parties to a CBA, which contains various contracted terms and agreements.

11. Article 2 of the applicable CBA defines "Transfer" as "the lateral movement of personnel between operating units, which requires a change of position description number."

12. Article 7.D. of the CBA entitled "Transfer or Reassignment of Union Officials" provides: "The Employer shall not transfer nor reassign employees who are elected officials, employees appointed to elective positions or stewards of the Union from their present position during their terms of office because of their official capacity with the Union nor for their

performance of same unless:

1. the employee requests such transfer or reassignment; or
2. the employee freely or voluntarily consents thereto; or
3. upon prior proof by the Employer that the transfer or reassignment is due to the normal rotation (without acceleration) of officers within the unit; or
4. due to an operational need for special skills which the employee possesses; or
5. due to the inability of the employee to perform the essential tasks of the employee's assigned duties.

13. Article 13 of the CBA provides, "Discipline shall be deemed to include written reprimands, suspensions, dismissals, disciplinary transfers and disciplinary demotions."

14. Under Article 20 of the CBA:

A. Placement of Employees - The placement of employees within each Police Department shall be the responsibility of the respective Police Chiefs.

B. Seniority / Hardship - In transferring or reassigning employees, the Police Department will insofar as practicable consider grade seniority when making such transfer or reassignment. In addition, due consideration shall be given for cases involving personal hardship.

C. Requests for Transfer - Employees may submit written requests for transfer to another district, division or unit and shall receive written acknowledgment of such request from the Department. Such requests shall be given full consideration by the Department.

D. Disciplinary Transfers - Whenever an employee is transferred or reassigned for disciplinary reasons, the employee shall be given written notification of and the reasons for such action.

E. Intergovernmental Transfers - Intergovernmental transfers of employees may be permitted when made in conformance with civil service laws and rules.

F. No Requirement to Live in District - No employee shall be required to live in the district where the employee is assigned the employee's tour of duty. The only exception will be employees required to work on the islands of Lanai, Molokai, or in the district of Hana.

G. Notice of Denial - If the transfer is denied, the employee shall be notified of

the denial.

H. Written Transfer List - The Employer shall maintain a dated written transfer list. Upon the request of a Union Representative, the employee shall be given access to the transfer list.

I. Length of Time Requests are Valid - Transfer requests shall be valid for one year from the date of filing.

15. Article 4 of the CBA provides:

A. Discrimination - The Employer and the Union agree that neither party will discriminate against any employee because of Union membership or nonmembership or lawful activity in the Union or lawful political activity.

B. Interference - The Employer and the Union agree that they will not interfere with the right of any employee to join or refrain from joining the Union. Employees will secure no advantage nor more favorable consideration or any form of privilege because of membership or non-membership in the Union.

HPD'S POLICIES, PROCEDURES AND PRINCIPLES

16. HPD's Standards of Conduct are mandatory policies and rules that every HPD police officer must follow, without exception, including the Chief of Police.

17. As part of the Standards, all HPD police officers must abide by HPD's Code of Ethics, which includes every officer's promise that: "Whatever [they] see or hear of a confidential nature or that is confided to [them] in [their] official capacity will be kept ever secret unless revelation is necessary in the performance of [their] duty."

18. HPD's Standards of Conduct require the Chief to treat her subordinates "with respect[.]"

19. The Standards of Conduct also require all officers "to be truthful at all times" and prohibited them from making "any false or misleading statement that maligns the character or reputation of any member of the police department."

20. Under the Standards of Conduct, HPD's Chief of Police owed a duty of loyalty to

all her fellow officers “as is consistent with the law and professional ethics” for the “morale and efficiencies” of the department.

21. One of the supervisory principals that all HPD supervisors are taught is that when an officer is given a new supervisory position, to “go in, [] observe, see what’s going on, make an assessment, and then make changes as you see appropriate.”

RIGHT TO PRIVACY

22. Article I, Section 6 of the Constitution of the State of Hawaii recognizes and protects an individuals’ right to privacy, stating in relevant part: “The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.”

23. The Hawaii Constitution further tasks the Hawaii Legislature with the responsibility to implement the people’s right to privacy. Haw. Const. art. I, § 6 (“The legislature shall take affirmative steps to implement this right.”).

24. Furthermore, the Hawaii Supreme court has explained:

“[A]rticle I, Section 6 ‘relates to privacy in the informational and personal autonomy sense.’ ” “[T]he privacy right protected by the ‘informational privacy’ prong of article I, section 6 is the right to keep confidential information which is ‘highly personal and intimate.’ ” “Highly personal and intimate” information that is protected by the informational prong of article I, section 6 includes “medical, financial, educational, or employment records.”

Brende v. Hara, 113 Haw. 424, 430, 153 P.3d 1109, 1115 (2007) (citations omitted).

25. Under HRS § 92F-14, the Hawaii Legislature recognized significant privacy interests in the following:

...

(4) Information in an agency’s personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a

governmental position, except:

(A) Information disclosed under section 92F-12(a)(14); and

....

(8) Information comprising a personal recommendation or evaluation;

HRS §92F-14.

26. Under HRS §92F-17(a):

An officer or employee of an agency who intentionally discloses or provides a copy of a government record, or any confidential information explicitly described by specific confidentiality statutes, to any person or agency with actual knowledge that disclosure is prohibited, shall be guilty of a misdemeanor, unless a greater penalty is otherwise provided for by law.

HRS §92F-17.

SUBJECT INCIDENT

27. At all times relevant herein, Tenari Ma'afala was a sergeant with HPD, a SHOPO member, and the duly elected President of SHOPO.

28. At the time of the incident, President Ma'afala served as SHOPO's President for 17 years, had been elected by his members for multiple consecutive terms and has never lost an election

29. During his career with HPD, President Ma'afala has never called in sick for duty

30. At all times relevant herein, Malcom Lutu was a sergeant with HPD, a SHOPO member, and the duly elected Vice President of SHOPO.

31. At all times relevant herein, Michael Cusumano was a lieutenant with HPD, a SHOPO member, and the duly elected Secretary of SHOPO.

32. At all times relevant herein, Don Faumuina was an officer with HPD, a SHOPO member, and a duly elected Director at Large of SHOPO.

33. On or about 10/25/17, the Honolulu Police Commission publicly announced its

selection of Susan Ballard as HPD's new Chief of Police.

34. On or about 10/25/17, media outlet Hawaii News Now published a story about Respondent Ballard's selection as the new Chief of Police, explaining:

The pick comes as the department is still reeling from the public corruption charges against former Police Chief Louis Kealoha, his deputy prosecutor wife and five current or former officers. Kealoha went on leave in December, and got a \$250,000 when he retired the following month.

Kealoha was arrested Friday along with his wife, Katherine, and the two were each released on \$100,000 bond.

Ballard's selection comes nearly eight years after Kealoha was sworn in as Honolulu's police chief. His tenure was marked not only by the years-long corruption probe, but by concerns about his handling of domestic violence cases and several incidents of alleged officer wrongdoing.

35. Upon information and belief, Respondent Ballard told a media outlet that during Louis Kealoha's tenure as the Chief of Police, she had been "sidelined for her criticism of former Chief Kealoha and his wife, deputy prosecutor Katherine Kealoha, and four other officers, who were indicted" on or about 10/20/17 "as a result of a federal investigation into an alleged criminal conspiracy to frame a Kealoha family member."

36. Chief Ballard also claimed she was "blackballed" and "marginalized for being outspoken about her criticisms" of former Chief Kealoha and was retaliated against, including being assigned to HPD's Central Receiving Desk – an assignment that she admittedly "dreaded."

37. Chief Ballard perceived that SHOPO was supporting Chief Kealoha as the Chief of Police.

38. Upon information and belief, Respondent Ballard told a media outlet that "[t]oo many officers that are fired for just reasons are returned to work[.]"

39. Complainant SHOPO is the exclusive representative of covered police officers that are "fired" and represents those officers through a grievance procedure agreed to by the

parties under the CBA, some of which result in the reinstatement of police officers through the agreed upon arbitration process that utilizes a neutral arbitrator.

40. On or about 10/31/17, Respondent Ballard was sworn in as HPD's new Chief of Police.

41. SHOPO President Tenari Ma'afala attended Chief Ballard's swearing in and stated in an interview that SHOPO was excited for their new chief and for the "wisdom and knowledge" she would bring to the department.

42. On or about 11/1/17, SHOPO President Ma'afala stated in an interview that SHOPO "supports and stands by the new police chief." He further explained:

We just wanted to get a chief in place and we congratulate Chief Ballard going forward and from the union's perspective, it's always been a partnership for the greater good. We might have differences and we have a rule that we all agree by that we might agree to disagree but don't take it personal. At the end of the day it's for the greater good for the officers who are tasked to serve the public.

43. HPD's department wide transfers are conducted at predetermined dates during the year, each of which are known within the department as a "push."

44. "Push" dates are announced via information notices which are emailed to all police officers within HPD.

45. At the time Respondent Ballard was sworn in as the Chief of Police, the upcoming "push" date was on 1/28/18.

46. At the time Respondent Ballard was sworn in as the Chief of Police, SHOPO President Ma'afala was assigned to HPD's Peer Support Unit.

47. At the time Respondent Ballard was sworn in as the Chief of Police, SHOPO Vice President Lutu was assigned to HPD's Criminal Investigation Unit.

48. At the time Respondent Ballard was sworn in as the Chief of Police, SHOPO

Secretary Cusumano was assigned to HPD's Criminal Investigation Unit.

49. At the time Respondent Ballard was sworn in as the Chief of Police, SHOPO Director at Large Faumuina was assigned to HPD's Peer Support Unit.

50. Upon information and belief, at no time as the HPD's Chief of Police did Respondent Ballard revoke the 1/28/18 "push" date, and department wide transfers were in fact conducted on the 1/28/18 "push" date.

51. However, in November 2017, SHOPO President Ma'afala was issued a notice that he was being transferred to the midnight patrol watch in Waikiki effective 12/1/17 or almost two (2) months before the official "push" date.

52. At all times relevant, SHOPO President Ma'afala did not request a transfer out of the Peer Support Unit, did not volunteer to be transferred nor did he request to be transferred to the midnight patrol watch in Waikiki.

53. In November 2017, SHOPO Vice President Lutu was issued a notice that he was being transferred to the Major crimes section of the Criminal Investigation Division effective 12/1/17.

54. At all times relevant, SHOPO Vice President Lutu did not request a transfer out of the Criminal Intelligence Unit, did not volunteer to be transferred nor did he request to be transferred to Major crimes section of the Criminal Investigation Division.

55. In November 2017, SHOPO Secretary Cusumano was issued a notice that he was being transferred to the Central Receiving Desk effective 12/1/17.

56. At all times relevant, SHOPO Secretary Cusumano did not request a transfer out of the Criminal Intelligence Unit, did not volunteer to be transferred nor did he request to be transferred to the Central Receiving Desk.

57. In November 2017, SHOPO Director at Large Faumuina was issued a notice that he was being transferred to the midnight patrol watch in Downtown Honolulu effective 12/1/17.

58. At all times relevant, SHOPO Director at Large Faumuina did not request a transfer out of the Peer Support Unit, did not volunteer to be transferred nor did he request to be transferred to the midnight patrol watch in Downtown Honolulu.

59. On or before 12/22/17, Respondent Ballard gave an interview to media outlet Civil Beat wherein she disclosed confidential and private information relating to SHOPO President Ma'afala's personnel file, her evaluation of his job performance, his reassignment to "a midnight shift" and alleged discussions she had with SHOPO President Ma'afala regarding personnel matters.

60. Upon information and belief, during her interview with media outlet Civil Beat, Respondent Ballard accused and inferred that SHOPO President Ma'afala had pared down the Peer Support unit "to just three people"; that he and the unit had abused overtime compensation; they did not "follow along with the spirit of the unit's mission"; under his leadership the unit "lost its way" and the Chaplains were not involved "like they should be"; that she "asked Sergeant Ma'afala if he wanted to remain with the Peer Support Unit on a volunteer basis, but he declined", and that "[h]e's chosen not to participate in the peer program any more".

61. Respondent Ballard's accusations were patently false and defamatory for various reasons, including but not limited to the following:

- i. The unit was already pared down when SHOPO President Ma'afala was transferred to the unit as a sergeant.
- ii. Respondent Ballard never asked Sergeant Ma'afala if he wanted to remain with the Peer Support Unit on a "volunteer basis," therefore he could not have declined such an offer if he was never asked in the first place.
- iii. Respondent Ballard never asked SHOPO President Ma'afala to volunteer

for the Peer Support Unit.

- iv. SHOPO President Ma'afala did not abuse overtime pay and instead on many occasions waived overtime that he was entitled to under the CBA and the law, and consistently declined Acting Lieutenant pay when he was entitled to such pay under applicable civil service rules.
- v. SHOPO President Ma'afala requested on several occasions to be certified as a ICISF Instructor Trainer so that he could train and certify other officers but that was denied by the HPD administration for various reasons.
- vi. While with the PSU, SHOPO President Ma'afala had no control over the mission of the unit, the policies and procedures that governed the unit, was under the direct supervision and direction of an Assistant Chief, and was required to follow the directives handed down from the serving Chief of Police
- vii. SHOPO President Ma'afala's annual job evaluations did not contain a single reference to overtime abuse or any management deficiencies.
- viii. Chief Ballard conceded that SHOPO President Ma'afala was a good officer and she never "questioned him as an employee", "his quality of work" or "his supervisory skills."
- ix. While under SHOPO President Ma'afala's command, the PSU was highly regarded and even recognized as HPD's unit of the quarter.
- x. While with the PSU, SHOPO President Ma'afala's work was supervised directly by an Assistant Chief who also evaluated his work performance on a regular basis. President Ma'afala's job evaluations by each Assistant Chief were nearly flawless and illustrated his impeccable character and tireless work ethic
- xi. Chief Ballard never reviewed SHOPO President Ma'afala's service record or PSU performance evaluations prior to her interview with Civil Beat.

62. The confidential and private information and the false allegations disclosed to Civil Beat by Respondent Ballard, were in turn published and publicly disseminated by Civil Beat on 12/22/17 in an article entitled, "New Police Chief Reassigns Union President To Patrol Shift."

63. Civil Beat's article has led to a public outcry and harsh criticisms directed against

SHOPO President Ma'afala and SHOPO.

64. Respondent Ballard's false and disparaging remarks about SHOPO President Ma'afala painted him in a very sinister light and generated negative comments from the public about him, including comments that he was "corrupt," "milking the system" and "when asked to volunteer he declines although he claims to care so much about officers in need."

65. Respondent Ballard read the public's comments in response to the Civil Beat article but admitted she had to stop because she claimed she found it too "bothersome" because of the public's attacks on President Ma'afala and SHOPO.

66. In response to Civil Beat's article, Kauai Police Chief Darryl Perry publicly commended Sergeant Ma'afala for his work, and as "someone who can be counted on during difficult times."

67. In response to Civil beat's article, one of the Peer Support chaplains personally contacted SHOPO President Ma'afala after reading the article and offered a sincere "apology" for not making himself available to provide training and asked for "forgiveness."

68. On 1/11/18, SHOPO sent a letter to Respondent Ballard which stated in relevant part:

SHOPO was made aware of a recent article published in Civil Beat dated 12/22/17, which contained false statements, misrepresentations and inaccuracies that were attributed to you. The statements that Civil Beat ascribed to you targeted SHOPO President Tenari Ma'afala and were clearly meant to discredit and demean him, damage and malign his reputation and give the false impression that SHOPO's President had done something wrong.

...

For your information, Sergeant Ma'afala was called by the Civil Beat reporter for comment but because it was assumed the article related to HPD's operations and not to any union matter per se, he did not provide comment. As a result, your false statements and comments were not corrected. Although you may despise the impression you may hold that SHOPO supported Chief Kealoha, you should

keep in mind that SHOPO is there to support every Chief, you included, as we strive to work together for the safety of our officers and a better department. Our officers are hardworking and put their lives on the line every day they test out and step on their patrol beats. Seeing their President under attack by you has generated many calls to SHOPO expressing anger about your approach and tactics after only a few weeks on the job.

...

If you believe your statements were taken out of context or inaccurately reported, please tell us and explain as we are more than willing to give you the benefit of the doubt. However, if what was reported and attributed to you was accurate, then given the current situation, SHOPO is willing to give you the opportunity to publicly retract your statements that appear in Civil Beat's 12/22/17 article, in addition to issuing a public written apology to SHOPO and Sergeant Ma'afala including a statement that the allegations noted above were not true. If you comply, SHOPO and its President will consider the matter resolved and will give you until the close of business on Tuesday, January 16, 2018, after which SHOPO will assume you have no interest in retracting your statements or correcting the record. If that ends up being the case, SHOPO and its President will have no choice but to pursue its legal options including the filing of a Prohibited Practice Complaint against you and the City and County of Honolulu, and seek other civil remedies that may be available.

We sincerely hope that as our new Chief of Police, we can begin our relationship on the right foot and work together to effectively repair HPD's damaged public image. However, your alleged attack on SHOPO and its President based on false information, false allegations and the disclosure of confidential and private information is unbecoming of HPD's new leader and must be addressed immediately to mitigate the damages such acts have already caused.

If given the chance, SHOPO looks forward to a productive and harmonious relationship with you and your new administration, and therefore would like to put this issue behind us as soon as possible. (emphasis added)

69. Respondent Ballard did not respond by 1/16/18.
70. On 1/18/18, Respondent Ballard sent a letter to SHOPO wherein she did not deny making the statements attributed to her by the 12/22/17 Civil Beat article, nor did she retract or agree to retract her false statements.
71. On 2/5/18, SHOPO filed a Prohibited Practice Complaint against Chief Ballard and the City and County of Honolulu, which included but was not limited to the following

allegations:

- a. Respondent Ballard's unlawful and inappropriate disclosures to Civil Beat and its subsequent public dissemination has a chilling effect on a SHOPO's members in the exercise of their union rights by creating fear amongst SHOPO's members that joining or participating in lawful union activities or exercising any such rights will lead to similar attacks and unlawful disclosures by Respondent Ballard and her HPD management administration.
- b. Respondent Ballard willfully and intentionally discriminated and retaliated against SHOPO officials Ma'afala, Lutu, Cusumano and Faumuina because of their Union membership, official capacity and lawful activity within the Union.
- c. Respondent Ballard willfully and intentionally interfered with and restrained the employment and CBA rights of SHOPO officials Ma'afala, Lutu, Cusumano and Faumuina's because of their membership and activities within the Union.
- d. Respondent Ballard willfully and intentionally transferred and/or reassigned SHOPO officials Ma'afala, Lutu, Cusumano and Faumuina because of their official capacity with the Union and/or because of their performance within the Union.
- e. Respondent Ballard willfully and intentionally disciplined SHOPO officials Ma'afala, Lutu, Cusumano and Faumuina because of their involvement and membership with the Union.
- f. Respondents' conduct, actions and inactions were prohibited practices pursuant to HRS §89-13, and willfully and intentionally violated the terms of the applicable CBA and SHOPO President Ma'afala's privacy rights.
- g. Respondents' willful and blatant conduct and actions constitute violations of HRS §89-13(a)(1)-(5), (7) and (8), including but not limited to interfering, restraining and coercing Complainant's members from exercising their guaranteed rights under HRS §89, dominating and interfering with the existence of Complainant's organization, discriminating to discourage membership in Complainant's organization and because a police officer is a member or official of the union.

72. A hearing on the merits was held before the Board on 3/16/18. At the end of SHOPO's case-in-chief, Respondents orally moved for dismissal based on SHOPO's failure to present sufficient evidence to meet its burden of proof, and the Board directed Respondents to submit their motion in writing.

73. Respondents filed their Motion for Judgment on Partial Findings on 4/6/18, and

SHOPO filed its Motion in Opposition on 4/13/18.

74. The Board issued its Order No. 3442 on 1/17/19 wherein it granted Respondents' Motion for Judgment on Partial Findings Against Complainant thereby dismissing and closing SHOPO's prohibited practice complaint.

ERRORS IN THE HLRB'S ORDER NO. 3442

75. The Board's findings of fact and those findings of fact labeled as conclusions of law, listed below are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or are arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

76. The Board's conclusions of law and those conclusions of law labeled as findings of fact, listed below are in violation of constitutional or statutory provisions, in excess of the statutory authority of the HLRB, and/or affected by other error of law, and/or are arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

77. The Board's Finding of Fact that "[i]n November of 2018, Chief Ballard presented a plan for the HPD moving forward, entitled "A New Beginning" wherein "Chief Ballard decided to revamp the PSU and turn it into a unit that was more like its original concept in the mid-1990s" is clearly erroneous to the extent that Chief Ballard's plan was dated November 8, 2017, which is five (5) days after the PSU Officers were notified they were being transferred. The Board's Finding of Fact erroneously implies that Chief Ballard presented her plan entitled "A New Beginning" before she made the decision to transfer the union officials.

78. The Board's Finding of Fact that "quotes from Ballard in the Article do not mention Ma'afala's position as SHOPO President, and they focus primarily on the PSU and her planned revamp of the unit" and that the "quotes from Ballard in the Article do not mention any

of the other Officers”, is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

79. The Board’s Finding of Fact that SHOPO President Ma’afala viewed his transfer as a “sense of relief” is incomplete and therefore clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion and ignores the subsequent conduct by Chief Ballard which revealed that her given reasons for transferring SHOPO President Ma’afala was pretextual.

80. The Board’s Finding of Fact that the “evidence shows that Chief Ballard simply reassigned these Officers” is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

81. The Board’s Finding of Fact that SHOPO President Maafala “did not state that the transfer in any way prohibited him from continuing as SHOPO President” is incomplete and therefore clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

82. The Board’s Finding of Fact that Civil Beat author “Grube may have added commentary about SHOPO and identified Maafala as the President of the union, but this commentary does not appear to come from Chief Ballard” is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

83. The Board's Finding of Fact that SHOPO President Ma'afala's "ability to perform his job as SHOPO president is not touched upon in the article" is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

84. The Board's Finding of Fact regarding the Mohawk Valley Formula and its finding that strikebreaking is not related to union-busting, is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

85. The Board's Finding of Fact that "there is no reasonable tendency that Chief Ballard's comments would cause the 'turmoil, inner dissent, [] chilling effect, and [] fear of retaliation' as SHOPO contends" is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

86. The Board's Finding of Fact that "SHOPO has presented no evidence that Chief Ballard's statements included [] a threat or [] a promise" is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

87. The Board's Finding of Fact that SHOPO presented no evidence that Chief Ballard's actions interfered with the proper administration of SHOPO is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

88. The Board's Finding of Fact that Chief Ballard's comments to Civil Beat were not

“part of any alleged ‘[d]iscriminat[ion] in regard to hiring, tenure, or any term or condition of employment’” is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

89. The Board’s Finding of Fact that Chief Ballard’s comments to Civil Beat “did not affect the union officials ‘hiring, tenure, or any term or condition of employment’” is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

90. The Board’s Finding of Fact “that the reorganization of the PSU and the transfers of the union officials do not rise to the level of ‘inherently destructive’ conduct because any far-reaching effects of these actions do not hinder future bargaining or create continuing obstacles to the future exercise of employee rights” is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted.

91. The Board’s Finding of Fact that “SHOPO has made no showing that either type of alleged discrimination relates to the employees exercising a protected right” is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted.

92. The Board’s Finding of Fact that “the record shows that Chief Ballard’s statements were specifically about the issues raised by the PSU, its reorganization, and Ma’afala’s role in the PSU unit and not directed at his role as SHOPO president or at SHOPO itself” is clearly erroneous in view of the reliable, probative, and substantial evidence on the

whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted.

93. The Board's Finding of Fact that the "only evidence" supporting Chief Ballard's improper motive in transferring SHOPO's officials "is based on supposition and innuendo", is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted.

94. The Board's Finding of Fact that "there has been no showing of a causal connection between the improper motive and engaging in protect activity" is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted.

95. The Board's Finding of Fact that "[t]here is no evidence that any of the officers in this case engaged in protected activity" is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted.

96. The Board's Finding of Fact that "there has been no showing that there was any adverse action taken against any of the officers" is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted.

97. The Board's Finding of Fact that the "statement that the officials were transferred into undesirable position was not true" is incomplete and therefore clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted.

98. The Board's Finding of Fact that "there is no evidence that the transfers were

adverse actions taken against the officers” is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted.

99. The Board’s Finding of Fact that “[t]here is no evidence that SHOPO ever attempted to contact the employer to discuss any alleged changes that required negotiation” is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted.

100. The Board’s Finding of Fact that “SHOPO did not allege any statutory violations other than violations of HRS § 89-13(a)” is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted.

101. The Board’s Finding of Fact “that the reorganization of the PSU and the transfers of the union officials do not rise to the level of ‘inherently destructive’ conduct because any far-reaching effects of these actions do not hinder future bargaining or create continuing obstacles to the future exercise of employee rights” is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted.

102. The Board’s Finding of Fact that “the evidence in the record regarding Chief Ballard’s discriminatory intent is based on supposition and innuendo and not on facts” is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted.

103. The Board’s Finding of Fact that “there is no question that statements to a reporter do not qualify as an adverse employment action” is clearly erroneous in view of the reliable,

probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted.

104. The Board's Finding of Fact that SHOPO produced no evidence supporting its claims is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

105. The Board's Finding of Fact that SHOPO failed to establish a prima facie case supporting its claims is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

106. The Board's Finding of Facts as a whole ignores, disregards, and fails to address the undisputed and established facts in the record that supports SHOPO's prohibited practice claims against the Respondents, including but not limited to Chief Ballard's testimony that she perceived SHOPO as an organization that supported former Chief Louie Kealoha whom she believed "marginalized, "blackballed", and "sidelined" her for criticizing him, statements attributed to her by media outlet Civil Beat about SHOPO President Tenari Maafala which were false, disparaging and in violation of HPD policies and procedures, the CBA, and the Uniform Information Practices Act, the various reasons that Chief Ballard offered for transferring SHOPO President Tenari Maafala and the union officials before the official push date which were proven to be untrue, the direct evidence supporting SHOPO's claims, including causing dissension amongst SHOPO's members, internal turmoil within the union, and generating extreme negative attacks against SHOPO from the public, and Chief Ballard's testimony that she knew that the statements ascribed to her in the Civil Beat article served as the

basis for the public attacks on SHOPO but refused to correct, retract, or clarify those statements.

107. The Board's Conclusion of Law that the Hawaii Supreme Court in HGEA v. Casupang, 116 Haw. 73, 99, 170 P.3d 324, 350 (2007) and Aio v. Hamada, 66 Haw. 401, 410, 664 P.2d 727, 734 (1983) overruled its "natural consequence" standard which the Board previously applied in determining whether an Employer willfully committed a prohibited practice is in violation of constitutional or statutory provisions, in excess of the statutory authority of the HLRB, and/or affected by other error of law, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

108. The Board's Conclusion of Law, or inference thereof, that willfulness cannot be presumed or inferred when an employer engages in conduct reasonably tending to interfere with the free exercise of employee rights is in violation of constitutional or statutory provisions, in excess of the statutory authority of the HLRB, and/or affected by other error of law, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

109. The Board's Conclusion of Law that willfulness could not be presumed or inferred when the "natural consequence" of the Employer's conduct leads to a reasonable conclusion that HRS §89-13 was violated, is in violation of constitutional or statutory provisions, in excess of the statutory authority of the HLRB, and/or affected by other error of law, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

110. The Board's Conclusion of Law rejecting the "natural consequence" standard that it previously applied in determining whether a respondent acted willfully violated the Board's precedent and the doctrine of stare decisis.

111. The Board's Conclusion of Law that it can write, create or delegate to itself the authority to dismiss a prohibited practice complaint under Haw. R. Civ. P. Rule 52(c) before the conclusion of the hearing on the merits because "the Board rules are silent or ambiguous on procedural matters" is in violation of constitutional or statutory provisions, in excess of the statutory authority of the HLRB, and/or affected by other error of law, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

112. The Board's Conclusion of Law that it has no jurisdiction over the HPD's standards of conduct, supervisory principles, or the Uniform Information Practices Act, even when such conduct is alleged to be or related to a prohibited practice under HRS § 89-13, is in violation of constitutional or statutory provisions, in excess of the statutory authority of the HLRB, and/or affected by other error of law, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

113. The Board's Conclusion of Law that SHOPO failed to exhaust its remedies and thus cannot pursue an HRS § 89-13(a)(8) claim, is in violation of constitutional or statutory provisions, in excess of the statutory authority of the HLRB, and/or affected by other error of law, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

114. The Board's Conclusion of Law that "an employee is 'interfered with, restrained or coerced when the employer expresses views, arguments or opinion only if the expression contains a threat of reprisal or force or promise of benefit" is in violation of constitutional or statutory provisions, in excess of the statutory authority of the HLRB, and/or affected by other error of law, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

115. The Board's Conclusion of Law that HRS § 89-13(a)(2) and HRS § 89-13(a)(1) are "applied very differently and without similarity" is in violation of constitutional or statutory provisions, in excess of the statutory authority of the HLRB, and/or affected by other error of law, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

116. The Board's Conclusion of Law "that the reorganization of the PSU and the transfers of the union officials do not rise to the level of 'inherently destructive' conduct because any far-reaching effects of these actions do not hinder future bargaining or create continuing obstacles to the future exercise of employee rights" is in violation of constitutional or statutory provisions, in excess of the statutory authority of the HLRB, and/or affected by other error of law, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

117. The Board's Conclusion of Law that Chief Ballard's conduct was *prima facie* lawful is in violation of constitutional or statutory provisions, is in excess of the statutory authority of the HLRB, and/or affected by other error of law, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

118. The Board's Conclusion of Law that "there is no question that statements to a reporter do not qualify as an adverse employment action" is in excess of the statutory authority of the HLRB, and/or affected by other error of law, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

119. The Board's Conclusion of Law that "[i]f SHOPO was concerned that the transfers of the Officers would have effects on 'wages, hours...and other terms of conditions of employment which are subject to collective bargaining,'" "they had the right and obligation to

notify the employer in writing to discuss the changes”, is a misapplication of the law, in excess of the statutory authority of the HLRB, and/or affected by other error of law, and/or is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

For the foregoing reasons, Order No. 3442 in Case No. 18-CE-12-910 is:

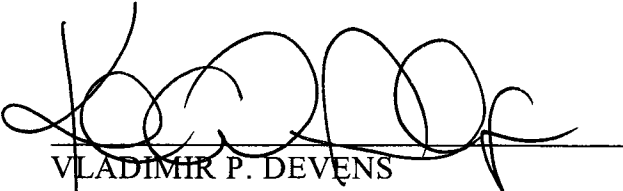
- a) In violation of constitutional and statutory provisions;
- b) In excess of the statutory authority or jurisdiction of the agency;
- c) Affected by other error of law;
- d) Clearly erroneous in view of the reliable, probative and substantive evidence on the whole record; and/or
- e) Arbitrary, capricious, and characterized by abuse of discretion and a clearly unwarranted exercise of discretion.

WHEREFORE, Complainant-Appellant SHOPO prays:

- a) That this Court reverse the Board’s Order No. 3442 in Case No. 18-CE-12-910;
- b) That Complainant-Appellant SHOPO be awarded its reasonable attorneys’ fees and costs;
- c) That the Court award such further relief that it deems to be just and proper and appropriate under the circumstances.

Complainant-Appellant SHOPO reserves all other defenses, objections and remedies for briefing to this Court

DATED: Honolulu, Hawaii, February 15, 2019.


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SHOPO